Supreme Court, U.S.
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No. 90-1267 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION

Petitioner

vs.

NORMAN DUERR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Is a state cause of action which does not implicate the administration of a plan or affect the duties and obligations upon plan administrators, and for which the Employee Retirement Income Act of 1974 (ERISA) does not provide a remedy, so remotely and tenuously related to a plan that it is not preempted.

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COUNTER-STATEMENT OF THE CASE

Respondent, Norman Duerr, filed the claims subject to this Petition under state law to recover damages arising out of Petitioner, General Motor's, breach of its promise to allow him to transfer to an hourly position. As a result of that breach, Duerr was unable to apply for severance payments when he left the employment of General Motors. The District Court dismissed Duerr's state law claims, finding them preempted by ERISA.

ERISA however provides no remedy to Duerr for the breach of that promise because he was not an hourly employee, and therefore not a "participant" in the Company's severance plan. Furthermore, General Motor's promise to return Duerr to an hourly position was not made by plan administrators and did not relate to plan

administration or ERISA in any manner. Finally, Duerr does not seek plan benefits, rather he seeks damages from his employer, for the breach of its promise to return him to an hourly rated position. Under these circumstances, the holding of the Court of Appeals for the Sixth Circuit that Duerr's state claims are so remotely and tenuously related to an ERISA plan that they should not be preempted was proper. It simply makes no sense to preempt state claims leaving plaintiff without a remedy, when those state claims do not impinge upon ERISA's scheme of regulation.

A. THE FACTS

In mid-November of 1987 Respondent, Norman Duerr (Duerr), became aware that Petitioner, General Motors Delco Product's

Division (Delco), was offering a severance pay package called the Voluntary Termination of Employment Plan (VTEP) to the hourly employees in the bargaining unit at its Kettering plant. At that time, Duerr was a salaried supervisor on the second shift at the Kettering Plant, but he had previously been an hourly employee in the bargaining unit. For personal reasons however, Duerr desired to work the first shift. When a position on first shift could not be found for him, Duerr decided to leave Delco and accepted a job in California with the McDonnell Douglas Corporation in January of 1988.

On February 1, 1988, Duerr requested an immediate return to hourly rate so he would be eligible for VTEP benefits when he resigned. Duerr made this request of his General Supervisor and Plant

Superintendent, neither of whom were responsible for the administration of the VTEP. Duerr merely wanted to be sure he could transfer to an hourly position so he would be eligible to apply for the VTEP benefits. In response, Duerr's supervisors offered him a temporary position on first shift. Duerr considered that offer, but he desired a permanent return to first shift and therefore did not change his mind about leaving the company.

Consequently, on February 15, 1988 Duerr went to the office of Pam Pitsenberger, who was in charge of administrating the VTEP. She told Plaintiff that returning to hourly rate was not her area of responsibility and that Duerr should see his supervisors concerning a return to an hourly rated

position. Duerr wanted to be sure there would be no problems in moving to an hourly rated position and therefore being eligible to sign up for VTEP benefits[1], before committing to buying a house in California. Therefore, Duerr spoke with his supervisors that same day, February 15th, about a return to an hourly position. Duerr's supervisors requested that he stay in his supervisor's position as long as possible so they could find a replacement for him, but promised him he could return to an hourly rated position on February 24th. The VTEP expired February 26th. In reliance on his supervisor's promise that he would be returned to an hourly rate on the 24th, Duerr agreed to remain in his supervisor's

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[1] In Duerr's case, he would have been eligible for VTEP severance benefits of $20,000.00 had he been able to return to a hourly position as promised.

position as long as possible and made no further attempts to return to an hourly rated position prior to that date. Also, in reliance on his supervisor's promise, Duerr and his wife went ahead with their plans to place a $2,000.00 down payment on a house in California. Duerr however was not transferred to an hourly rated position on the 24th as promised and was therefore unable to sign up for VTEP benefits.

Duerr filed suit October 30, 1988, in the United States District Court, Southern District of Ohio, Western Division. In his first two counts Duerr alleges that he is entitled under state law to damages resulting from Delco's breach of its promise to return him to an hourly position. Duerr alleged diversity jurisdiction on his first two counts. In

his third count, Duerr alleged that Delco intentionally interferred with the attainment of benefits under §510 of ERISA, 29 U.S.C. §1140. The District Court dismissed Duerr's §510 claim, finding that he was not a participant in the VTEP plan because he was not an hourly employee during the duration of that plan. Therefore the District Court concluded Duerr did not have standing to sue under §510. Plaintiff did not appeal from that dismissal. However, the District Court also dismissed Duerr's state claims, finding they were preempted by ERISA. Duerr appealed the dismissal of his state claims to the Sixth Circuit Court of Appeals, which reversed the District Court's decision.

B. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals held that Duerr's state law claims for breach of oral promise and promissory estoppel were not sufficiently related to the VTEP Plan to be preempted. Citing Perry v. PIE Nationwide, 872 F.2d 157, 162 (6th Cir. 1989) cert denied, 110 S.Ct 1166 (1990). The Court held that whether ERISA provides a remedy is one factor to examine in determining whether a claim is related to an ERISA plan. Because Duerr was not a "participant" in the VTEP, the Court found he had no potential remedy under ERISA.

In addition to finding that ERISA did not provide a remedy to Duerr, the Court also emphasized the fact that Duerr's suit ". . . does not implicate the administration of the plan, with which

ERISA is fundamentally concerned" or " . . . implicate any of the obligations and duties spelled out in ERISA." As the court noted, Duerr was not a participant in the plan. Nor was the promise relied upon by Duerr related to the plan. He was simply promised that he could transfer to an hourly rate.[2] In addition, the promise was made by front line supervisors, not plan administrators or plan fiduciaries. Finally, the Court noted that any damages recovered by Duerr would originate from Delco, not the Delco plan.[3]

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[2] As the Court of Appeals below noted, the promise in question was that Duerr " . . . could return to an hourly position on February 24, 1988."

[3] This fact is important for two reasons. First, it eliminates any risk that Duerr's claim would have an adverse impact on a self funded plan. More importantly, it emphasizes the fact that it was Delco as Duerr's employer, not as plan administrator, which Duerr is seeking to hold liable. Thus even if the VTEP were self funded, Duerr would still only be

The court distinguished Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986) cert denied, 481 U.S. 1016 (1987). In Phillips the Court of Appeals for the Eleventh Circuit held that plaintiff's state law claims were preempted even though ERISA did not provide a remedy. In Phillips however, the Court below noted, the employee's state law claim "necessarily depend[ed] upon an interpretation of the fiduciary duties imposed by ERISA" and thus was preempted. App A, infra, p. 69, quoting Phillips, 799 F.2d at 1470. "In contrast" the Court stated, "Duerr's claims do not implicate any of the obligations and duties spelled out by ERISA". Id.

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entitled to damages from Delco, not the Plan.

The Court also carefully analyzed this Court's decisions in both Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) and Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) in reaching its decision. The opinion is also entirely consistent with this Court's subsequent opinion in Ingersoll-Rand Co. v. McClendon, 59 U.S.L.W. 4033 (US Dec. 3, 1990). In McClendon this Court held that a Texas state cause of action " . . . which makes specific reference to, and indeed is premised on, the existence of pension plan" is preempted by ERISA. Id. at 4035. In the instant case however, the causes of action relied on by Duerr, promissory estoppel and breach of promise, are not premised on the existence of the plan. They are general causes of action without any relationship to the existence

of a plan. Thus the causes of action relied upon by Duerr are more closely akin to the garnishment statute in Mackey v. Lanier Collection v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988), where the Court found no preemption, than it is to the claim in McClendon. Duerr's causes of action, like the statute in Mackey, are generally applicable, make no reference to an ERISA plan, and function irrespective of an ERISA plan. See McClendon, 59 USLW at 4035 (distinguishing Mackey). Indeed, the only relationship between Duerr's causes of action and the VTEP is the fact that Duerr seeks damages he would have been able to obtain had his supervisors not breached their promise.[4]

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[4] In this sense, Duerr's claim is no different than an employee who claims he was unlawfully discharged for reasons unrelated to a ERISA plan (e.g., in breach

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SIXTH COURT OF APPEALS IS NOT IN CONFLICT WITH THE HOLDINGS OF THIS COURT OR WITH DECISIONS RENDERED BY OTHER COURTS OF APPEALS

A. The Decision Of The Court Of Appeals Is Not In Conflict With The Holdings Of This Court.

This Court has recognized that

> [s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law relates to a plan.

Shaw v. Delta Airlines, 463 U.S. 85 (1983). See also, Mackey v. Lanier Collection Agency & Services, Inc., 486 U.S. 825 (1988), Fort Halifax Package Co.

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of contract, due to his age) but claims lost pension benefits as part of his damages. His cause of action does not rely on the existence of a plan, but his claim for damages does.

v. Coyne, 482 U.S. 1 (1987). Applying this standard, the Court of Appeals found that Duerr's state claims were not sufficiently related to the VTEP to be preempted.

B. The Opinion Of The Sixth Circuit Court Of Appeals Is Not In Conflict With Those Of Other Circuits

The decision of the Court of Appeals is also in accord with the decisions of other circuits. Although the cases cited by Petitioner hold ERISA preemption may apply even if it leaves a plaintiff without a remedy, each one of those opinions involved claims which directly implicated plan administration. In Lee v. E.I. Dupont de Nemours & Co., 894 F.2d 755, 758 (5th Cir. 1990) and Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986) plaintiffs sought to place a state created duty upon plan

administrators to disclose the terms of plan amendments. Similarly in Lister v. Stark, 890 F.2d 941 (7th Cir. 1989), Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989) and Cefalua v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989), plaintiffs were trying to enforce oral representations regarding their entitlement to plan benefits. As the Court of Appeals in the instant case pointed out however, Duerr's claim involved neither the administration of a plan nor the duties and obligations placed upon plan administrators. The promise he seeks to enforce is merely that he would be allowed to return to an hourly rated position and has no relation to an ERISA plan. This was a decision made solely in the ordinary course of business. Duerr was well aware that his supervisors had no authority

over the administration of the VTEP. Indeed, Duerr does not rely on a single representation made by a plan administrator or regarding the plan in stating his claim.

The court in Lister v. Stark recognized this same distinction between a claim which implicates the administration of a plan and one which does not when it distinguished Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989) because it "did not involve an oral modification of a pension plan". Lister 890 F.2d at 945. Pizlo, like Duerr's case, involved state law claims of breach of contract and promissory estoppel based on promises unrelated to the plan. Pizlo, 884 F.2d at 120. Also as in this case, the plaintiffs in Pizlo did not seek plan benefits, but rather their " . . . damages

would be measured in part by the lost pension benefits the Plaintiffs would have received". Id. The court in Pizlo held plaintiffs' state law claims not preempted because they

> . . . would not submit [Defendant] to "conflicting employer obligations and variable standards of recovery", "determine whether any benefits are paid" nor "directly affect the administration of benefits under the Plan". See Sorosky v. Burroughs Corp., 826 F.2d 794, 800 (9th Cir. 1987).

Pizlo, 884 F.2d at 120. The same is true in the instant case. Thus the decision of Seventh Circuit of Appeals in Lister v. Stark explicity recognized that claims such as Duerr's should not be subject to preemption.

In sum, there is no conflict in the circuits.[5] All of the cases cited by Petitioner involve factual circumstances which directly implicate plan administration or the duties and obligations placed upon administrators, unlike the instant case.[6] The Court of Appeals for the Sixth Circuit was well aware of this important fact when it

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[5] Petitioner claims Perry v. PIE Nationwide, recognized such a conflict among the circuits. However, when the court stated in Perry v. PIE Nationwide "It may be seen that there is respectable authority for both positions," it was considering whether fraud, misrepresentation and promissory estoppel in the administration of plan were preempted. Perry, 872 F.2d at 158, 159. Clearly there is no conflict when, as here, the administration of a plan is not involved.

[6] Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 695 (6th Cir. 1989), cited by Petitioner, also involved a plaintiff's promissory estoppel based on actions and representations taken in the administration of the plan and thus is not in conflict with the decision of the Court of Appeals in this case.

distinguished, Phillips v. Amoco and Lee v. E.I. Dupont de Nemous & Co., because they involved the administration of a plan. Lister v. Stark, which Petitioner claims is in conflict with the instant case, recognized the same distinction in distinguishing the Pizlo case. Petitioner attempts to create a false conflict by turning Duerr's case into what is not - a suit to enforce a promise or representation made by plan administrators in the administration of a plan.

Similarly, Petitioner places far too great an importance on the Court of Appeal's consideration of Duerr's lack of a remedy under ERISA as a factor in considering whether his state claims were preempted. The Court merely held that

> . . . whether ERISA provides a remedy is one factor to examine

> in determining the extent to which the claims are related.

The Court below did not hold that a remedy under ERISA was necessary to a finding a preemption. Indeed, it implicitly recognized that state law claims in cases such as Phillips v. Amoco Oil Co., which implicated plan administration, would be preempted even though ERISA did not provide Plaintiff with a remedy.

Petitioner fails to recognize that there is a fundamental difference between a case such as Phillips v. Amoco Oil Co., where Congress has comprehensively set forth the duties of the parties and the remedies available for breaches of those duties, and the instant case where Congress does not even purport to regulate the relationship between the parties. To preempt a plaintiff's state law claim

where Congress has regulated the relationship is consistent with the purpose of maintaining a uniform federal scheme of regulation and it can be reasonably said Congress intended such a gap, i.e. the lack of a remedy. However, to do so where Congress has not regulated the relationship between the parties in any manner, serves no purpose, makes fundamentally no sense, and it cannot be reasonably said such a gap was intended.

All the cases relied upon by Petitioner involved claims which implicated areas comprehensively regulated by ERISA. For example in Lister v. Stark, 890 F.2d 941, 943 (7th Cir. 1989) plaintiff, a participant in a pension plan, sought to enforce a verbal promise that he would be credited for years of service under his pension plan. Clearly

such a promise implicated the administration of defendant's plan. In such a case, it can be reasonably stated Congress intended to preempt plaintiff's claims.

The instant case however is fundamentally different from the cases relied upon by Petitioner. There is absolutely no indication in the instant case that Congress intended a gap in the law, because Congress does not even purport to regulate the relationship between non-participants and employers who are not acting as plan fiduciaries or in the administration of a plan. Under these circumstances, a plaintiff's lack of a remedy under ERISA is evidence that any state law claims he might have are so remotely and tenuously related to ERISA that they should not be preempted. When

the intent of Congress is not in jeopardy of being disrupted, there is no reason to preempt a claim such as Duerr's, leaving a plaintiff without any remedy to redress the wrongs he has suffered. Thus, the decision of the Court of Appeals below is also entirely consistent with Congressional intent" . . . that plan and plan sponsors would be subject to a uniform body of benefit law." Ingersoll-Rand, 59 U.S.L.W at 4035-4036.

C. Duerr Is Not Seeking Plan Benefits In His State Law Claims

Far from the court below being confused as Petitioner suggests, it is Petitioner who is confused. Petitioner is simply wrong in claiming that Duerr is litigating benefit claims under state law which would risk the creation of inconsistent and piecemeal regulation of

employee benefit claims. Duerr is not alleging he is entitled to VTEP benefits, he is simply alleging that he is entitled to damages equal that amount caused by the failure of his employer to return him to an hourly rated position. The same issues were addressed by the Ninth Circuit in Scott v. Gulf Oil Corp.,

> . . . [P]laintiff, having waived participation in the plan, was not a participant or beneficiary . . . [thus] . . . although the Plaintiff might have been entitled under the state law of fraud to damages equal to the benefits he would have received had he participated in the plan, such damages were not themselves a "benefit under a plan" and therefore could not be awarded in an ERISA action.

754 F.2d 1494, 1505 (9th Cir. 1985), (discussing Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1983)). See also Matori Bros. Distributors v. Jones-Masengale, 781 F.2d 1349, 1358 (9th Cir. 1986)(damages awarded for injuries suffered due to wrongful exclusion from an ERISA plan . . . not benefits under an ERISA plan"). As in Freeman and Scott, Duerr here is not seeking plan benefits but the value of Delco's broken promises and the consequential damages caused by his detrimental reliance. Indeed, because Duerr was held not to be a participant in the VTEP he has no basis to claim a recovery of plan benefits.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN ERROR

Contrary to Petitioner's assertion, the Court of Appeals below did not establish a new test to determine whether ERISA preemption exists. It simply considered the facts of Duerr's case and concluded that his state law claims were not sufficiently related to ERISA to be preempted. That holding is entirely consistent with both the rulings of this court and Congressional intent.

Respondent is in complete agreement with Petitioner that the purpose of ERISA preemption is to eliminate "the threat of conflicting and inconsistent state and local regulation" on plan administrators. 120 Cong Rec 29197 (1974), cited with approval in Pilot Life Ins Co., supra at 46, and create a uniform source of law for evaluating the conduct of plan

administrators. Introductory Statement of Sen. Javits on S. 1557, reprinted in I Legislative History of ERISA, 273, 279 (1973). What Petitioner fails to recognize however, is that the instant case does not involve a threat to any of these policies. Contrary to Petitioner's repeated assertions this is not a claim for benefits under an ERISA covered plan. To the contrary, as the Court below recognized, this was an action by a person who was not a participant in a plan against his employer for its failure to keep a promise unrelated to the administration of the plan. Thus the outcome of this case will have absolutely no impact on the administration of an ERISA plan.

As already noted, the decision of the Court of Appeals in the instant case is consistent with this court's decisions in Ingersoll-Rand v. McClendon, Pilot Life, and Shaw.

CONCLUSION

In an attempt to convince this Court to grant a writ of certiorari, Petitioner has cast this case as something it is not, a suit for plan benefits which implicates the administration of a plan and the duties and obligations created by ERISA. Similarly, Petitioner has ignored the difference between the instant case, which did not involve the administration of a plan, and the decisions of other Circuit Courts of Appeal which do implicate the administration of a plan, in order to

create a false conflict between the circuits regarding the affect of a lack of a remedy under ERISA on preemption. In reality, the Court below simply applied this court's "relate to" standard to the instant case, evaluated the particular facts of the case, and found Duerr's state claims so remotely and tenuously related to the plan in question that they should not be preempted.

For the foregoing reasons, Respondent respectfully requests this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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